The case of *Wood v. Seattle*, 23 Wash., 1, referred to on page 20 of this brief, is not in the brief given due prominence. In that case the court said, pages 20, 21:

"It is next said that the proposed ordinance, when considered in connection with the acquisition of the existing street-railway lines, creates a 'monopoly and trust,' and is therefore in violation of section 22 of article 12 of the state constitution. * * * The argument is that portions of the lines now in operation, and which may be absorbed by the proposed ordinance, are parallel and competing lines, and because of this provision the city is without power to pass an ordinance under which they may be combined or consolidated. Whether the proposed ordinance will have the effect of consolidating competing lines does not very clearly appear from the record, but, assuming that it will we cannot think that this section of the constitution was intended to be a limitation upon the legislative power to authorize such a consolidation whenever it may deem the public interests demand it. The prohibition is directed against combinations between corporations, companies, or individuals, made 'for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity,' and it is combinations of this character and for these purposes that constitute the monopolies and trusts which the constitution interdicts. Elsewhere in the constitution ample power is given the legislature to correct and prevent abuses such as the respondents contemplate, by fixing maximum rates and charges for the transportation of passengers and freight; and it was from this power that the constitution-makers intended that relief should be found from (to quote from that instrument) 'discrimination and extortion in the rates of freight and passenger tariffs,' rather than from the fancied relief to be obtained from competing lines."

The other provisions of the constitution to which the court refer in the above language are sections 13, 15 and 18 of article 12, which reads as follows:

SEC. 13. "All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control * * *. All railroad companies

shall receive and transport each the other's passengers, tonnage, and cars, without delay or discrimination."

SEC. 15. "No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for transportation of the same classes of freight or passengers within this State, or coming from or going to any other State. Persons and property transported over any railroad, or by any other transportation company, or individual, shall be delivered at any station, landing, or port at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port, or landing. Excursion and commutation tickets may be issued at special rates."

SEC. 18. "The legislature shall pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, and to correct abuses and prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads and other common carriers in the State, and shall enforce such laws by adequate penalties. A railroad and transportation commission may be established, and its powers and duties fully defined by law."

Supreme Court of the United States.

OCTOBER TERM, 1901.

ORIGINAL.

STATE OF WASHINGTON,
Complainant,
vs.
NORTHERN SECURITIES COMPANY, GREAT NORTHERN RAILWAY COMPANY AND NORTHERN PACIFIC RAILWAY COMPANY,
Defendants.

BRIEF ON BEHALF OF DEFENDANT RAILWAY COMPANIES UPON MOTION FOR LEAVE TO FILE BILL.

If the organization and acts of the Northern Securities Company infringe upon any rights of the State of Washington the state is certainly entitled to redress, and if the bill now presented shows such an infringement and makes out a case of which this court, without departing from its settled practice, may properly take cognizance, the defendants have reason to welcome rather than to oppose the course of the state in resorting to this, the highest court in the land, whose decision will everywhere be received as authority.

This court has, however, by a series of decisions, deter-

mined that not every suit brought by a state against citizens of another state is the proper subject of cognizance, has defined what original suits a state may and what suits it may not bring against citizens of another state, and has wisely determined that the question whether an original suit proposed to be brought falls within one class or another —whether the court will or will not take cognizance of it— shall be passed upon at the outset, when the declaration or bill is offered for filing.

In view of the character of the original jurisdiction of the court, the question whether it shall be exercised in a given case is of an importance by no means limited to the effect of the decision on the parties to it. In the recent case of *Minnesota v. Northern Securities Company* the court indicated a willingness, if not a wish, to hear argument, by ordering notice to be given of the motion to file the bill. That case went off on a question of defect of parties. In *this* case that defect does not exist, but in respect of other questions sought to be raised, this case closely resembles that of the State of Minnesota. In determining questions so important, we assume that the court will now, as before, desire the assistance of counsel.

We accordingly submit the following considerations as showing that the state has not in its bill made a case of which the court can, without departing from its settled doctrine and practice, take cognizance.

Whether the state has made such a case depends on the nature of the right, if any, asserted in the bill, which the suit is brought to enforce, the nature of the violation, if any, of the right, which the state seeks to prevent or redress, and the nature of the relief sought, whether within or beyond the competency of the court to grant.

The gist of the bill is:

That certain stockholders of the two defendant railway companies (one a corporation of Minnesota, the other a corporation of Wisconsin) have caused to be formed under the laws of New Jersey the Northern Securities Company, with the intention of making that company the holder of a majority of the stock of the two railway companies; that, in pursuance of this plan, the Securities Company has acquired a majority of such stock. The articles of incorporation of the Securities Company are set forth, and it appears (and must be here presumed) that it has all the power of a natural person to buy, hold, vote, and sell stocks; but its right to hold and vote the stock in question is challenged because the lines of the railway companies (some part of which is in Washington) are parallel and competing.

Though the alleged wrongful acts were done, not in Washington, but in New Jersey, the complaining state says they are illegal and should be enjoined by this court because in violation of those sections of article 12, constitution of Washington, reading as follows:

> "SEC. 14. No railroad company or other common carrier shall combine or make any contract with the owners of any vessel that leaves port or makes port in this state, or with any common carrier, by which combination or contract the earnings of one doing the carrying are to be shared by the other not doing the carrying."
>
> "SEC. 16. No railroad corporation shall consolidate its stock, property, or franchises with any other railroad corporation owning a competing line."
>
> "SEC. 22. Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership, or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or with any copartnership or association of persons, or in any

manner whatever, for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise."

The State of Washington is a political corporation with full sovereignty, except so far as surrendered to the United States, over the district or country known by that name. Among the powers surrendered to the United States is that to regulate interstate commerce, and as to that commerce the State of Washington has no power beyond that of legislating in the way of police to protect the lives, health, and well-being of its citizens. It has no power to regulate that commerce. But as to commerce local to the State there is now no question as to its power to fix reasonable railway rates (*Chicago, Milwaukee & St. Paul R'y Co. v. Minnesota*, 134 U. S., 418; *Minneapolis Eastern R'y Co. v. Minnesota*, 134 U. S., 467; *Smyth v. Ames*, 169 U. S., 466); to compel roads to make connections with other railroads for the purpose of transferring cars (*Wisconsin Railroad Co. v. Jacobson*, 179 U. S., 287); to regulate the running of passenger trains so as to accommodate communities along the lines (*Lake Shore R'y Co. v. Ohio*, 173 U. S., 285); to regulate the heating of passenger cars and the manner of running trains (*New York R. Co. v. New York*, 165 U. S., 628); and generally to regulate the operation of railroads, require the construction of proper stations and facilities, bridges and street crossings, or the performance of any other service reasonable in the maintenance and operation of a

public highway (*Cleveland R'y Co. v. Illinois*, 177 U. S., 514; *State v. Minneapolis & St. Louis R'y Co.*, 80 Minn., 191).

In short, as to local rates and facilities the State of Washington has full power so long as its requirements are reasonable. Neither the state nor any citizen has any right to demand or require what is unreasonable, and certainly no equity to come into this court to obtain unreasonably low rates by injunction. Reasonably low rates it may obtain by its own statutes and in its own courts. The bill does not allege any accomplished injury, but complains of acts which it is alleged have a tendency to injure. The bill does not say that any rate has been raised, or that any rate is unreasonably high, or that any reasonable facility of traffic is not furnished. Neither the state nor its citizens can suffer any actual injury unless, either unreasonably high rates are charged, or inadequate facilities furnished. As to these matters the state has the remedy in its own hands in its own jurisdiction. The original jurisdiction of this court in equity cannot, we submit, be invoked where the state has in its own legislature and courts a full, adequate, and perfect remedy.

In this bill the state seeks in a foreign jurisdiction a remedy by injunction to compel the Northern Securities Company, a New Jersey corporation, to conform to and obey what it conceives to be its law and policy; this although the Securities Company is lawfully organized in the State of New Jersey with power to buy and hold stock, and is doing no act which it is not authorized to do by the law of the state of its organization. Its acts were all done in that state and none of them in the State of Washington. The bill

asks this court to restrain by injunction a citizen of New Jersey from doing there acts entirely lawful according to New Jersey laws and sanctioned by the policy of that state, on the allegation that those acts either violate, or evade, or tend to render nugatory, laws of the complainant state. The sole ground of complaint is the alleged violation in New Jersey of certain enactments contained in the constitution of Washington. The injunction prayed for would be nothing more or less than compelling the defendant to obey in New Jersey the laws of Washington.

The sum and substance of the grievance is, that the ownership of the shares of the two defendant railway companies, formerly vested in several persons, has now been united in one holder, and that holder a corporation. But reference is made to no Washington statute, and none exists, which prohibits individuals or copartnerships or private corporations having charter authority from acquiring and holding stocks of parallel or competing railroad companies. On the contrary, the corporation laws of the State of Washington (1 *Ballinger's Code*, sec. 4261) make stock personal property, and of course it is salable as such according to the law of the place where it is sold. The provision in the statute quoted, that the stock shall be transferable only by registry on the corporate books, is a declaration that, except as far as so limited, it is transferable according to the customs of the commercial world (*Bank v. Lanier*, 11 Wall., 369, 377).

There is not one syllable in the constitution or statutes of Washington which purports to abridge the right of individuals, partnerships, or corporations to buy stock, and the complainant is driven to *infer* so important a prohibition.

And more than this. The right asserted by the State of Washington—the right and the only right which she claims has been violated—is the right to dictate who may and who shall not be shareholders in two railway companies, one chartered by Wisconsin, the other by Minnesota. Washing-

ton may prescribe the qualifications for shareholders in companies of her own creation. She may authorize or forbid the purchase of shares in foreign companies by her own corporations and possibly by her individual citizens. But the right here asserted, to dictate that a corporation of New Jersey shall not become a shareholder in a corporation of Wisconsin or of Minnesota, has no basis whatever in principle or authority. Every state in the Union—certainly every state through which these railways run—has as valid a claim as Washington to the right she here asserts, and it is needless to picture the results of their exercise of it.

The court should not allow this bill to be filed if it plainly appears that no decree could be rendered upon it in favor of complainant. The court considered, in *Pearsall v. Great Northern Railway Company*, 161 U. S., 646, 671, and in *Louisville and Nashville Railroad Company v. Kentucky*, 161 U. S., 677, 693, a statute of Minnesota and a provision of the constitution of Kentucky prohibiting the consolidation of parallel and competing roads, which were stronger and broader than section 16, article XII, of the Washington constitution. The court said in the former case (pp. 671, 672):

> "Doubtless these stockholders could lawfully acquire, by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common. This, though possible, would not be altogether feasible, and would require considerable time for its accomplishment. In a few years the two companies might by sales of the stock so acquired, become completely dissevered, and the interests of the stockholders of each company thus become antagonistic."

And in the latter case (p. 693):

> "It is true, as was observed in *Pearsall v. The Great Northern*, that the stockholders of the L. & N. Co. may individually become the purchasers of the

Chesapeake Co. at a judicial sale, and may organize a new corporation, but it would still be a corporation separate and distinct from that of the L. & N. Co. The inhibition of the constitution is not against the sale to individuals, though they may chance to be stockholders in a competing line, but against the acquisition by a railway, in any form, of a parallel or competing line."

See also, to the same effect, *Havemeyer v. Havemeyer*, 43 N. Y. Superior Ct., 515; *Commonwealth v. R'y Co.*, 139 Pa., 457, reaffirming doctrine held in 132 Pa., 591; *White v. Ryan*, 15 Pa. C. C., 170.

We submit that the court in the language above quoted passed upon the fundamental and essential question presented by this bill, so far as concerns so-called consolidation of competing railways. If any law could, it is clear that no law has attempted to say that one or several individuals could not purchase and hold all the stock of two competing roads. So doing is neither prohibited by morality, nor by statute, nor by any rule of the common law. It is perfectly innocent and lawful. If one man may buy stock in two competing roads, doubtless a partnership may; or several men, having already acquired the stock, may lawfully form a partnership and turn in the stock as partnership assets; or a corporation, having by the law of its organization the same power which an individual has to buy and hold stock, could buy and hold the stock of parallel and competing railways as an individual might; or several individuals, having acquired stock in competing roads, might lawfully form a corporation and might make the stock corporate assets as lawfully as they might make it partnership assets.

This right is not impaired by any of the sections of the Washington constitution cited. The prohibitions of section 16 are directed wholly against competing railway companies. A corporation and its shareholders are different entities (*Baldwin v. Canfield*, 26 Minn., 43; and see *Bank*

of U. S. v. Planters' Bank, 9 Wheat., 904, 907, decided in 1824, when, for purposes of jurisdiction, the court looked to the citizenship of the shareholders in suits against corporations). Neither a single stockholder, nor a majority of stockholders, nor 95 per cent of the stockholders are the corporation (*Humphreys v. McKissock*, 140 U. S., 304, 312). The court held in *Pullman Car Co. v. Missouri Pacific R'y*, 115 U. S., 587, that ownership of all the stock of a corporation did not constitute "control," saying, pp. 596, 597:

> "We are also of opinion that the railroad of the St. Louis, Iron Mountain and Southern Company is not controlled by the present Missouri Pacific Company in such a way as to require that company to haul the Pullman cars over it, if the contract is binding on the new company to the same extent it would be on the old were that company still in existence and standing in the place of the new. Confessedly the St. Louis, Iron Mountain and Southern Company keeps up its own corporate organization. It operates its own road. It has its own officers and makes its own bargains. The Missouri Pacific owns all or nearly all its stock, and in that way can determine who shall constitute its board of directors, but there the power of that company over the management stops. The board when elected has controlling authority, and for its doings is not necessarily answerable to the Missouri Pacific Company. The two roads are substantially owned by the same persons and operated in the same interest, but that of the St. Louis, Iron Mountain and Southern Company is in no legal sense controlled by the Missouri Pacific. * * * The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain and Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily

they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain and Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company that company has no power to prevent it, except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property."

The provision of the constitution forbidding either of two competing *railroad* companies from doing certain things is upon its face and by its plain meaning no more a prohibition to the stockholders of either in their individual capacity than the provision in the constitution of Minnesota (art. IX, sec. 5) that "the state shall never contract any debts for works of internal improvements, or be a party to carrying on such works," is a prohibition to its citizens. This constitutional provision is held not even to apply to cities (*Davidson v. Commissioners*, 18 Minn., 432, 442).

To charge the defendant railway companies or their directors with responsibility for their stocks being held by one person or corporation is absurd. A corporation and its board of directors have no right to decide who shall hold its stock; that matter does not concern either the corporation or board. Suppose an individual or a securities company had presented shares to the board of either of these railway companies for transfer on its books. Could the board properly have said, "We decline to recognize your

ownership, because we apprehend you have also bought, or are seeking to buy, stock in a competing railway, and this we conceive to be harmful to public interests?"

If the legislature had intended to include individuals, partnerships, and corporations other than railway companies, the prohibition would have been directed in plain terms against them. The insertion of a few simple words was all that was necessary to express the intention now claimed by the state, and it cannot be conceived that the legislature had that intention and yet refrained from so easy an expression of it.

The prohibition is against consolidating the "stock, property, or franchises" of one railroad corporation with any other railroad corporation owning a competing line. The term "consolidate" was defined by the first legislature of Washington which met soon after the adoption of the state constitution, and which doubtless contained many of the framers of that instrument (1 *Ballinger's Code*, sec. 4304). This statute opens with language which follows almost word for word the provisions of section 16 in article XII of the constitution: "Any such railroad corporation may consolidate its stock, franchise and property with any other railroad corporation * * * *and become one corporation.*" The act then provides that articles shall be adopted by each corporation and filed in a public office stating the terms of the consolidation.

This statute contains a correct definition of the term "consolidate," according to its usual signification (2 *Morawetz on Corp.*, sec. 939, and cases cited; *Green County v. Conness*, 109 U. S., 104, 106; *Central Railroad v. Georgia*, 92 U. S., 665, 670, 671; *Tennessee v. Whitworth*, 117 U. S., 139, 147; *Archer v. R'y Co.*, 102 Ill., 493, 503; *Beach on Corporations*, sec. 328; *State ex rel. Nolan v. Montana R'y Co.*, 21 Mont., 221; *Gore v. R'y Co.*, 19 Abbott's New Cases, 193, 210).

As this court pointed out in the *Pearsall case*, the ownership by one individual or set of individuals of stock in two

competing railway companies is not consolidation and not within the meaning or spirit of the statute, because at any time the stock so acquired may be parted with, and any relations between the companies become completely dissevered, and the interests of their respective stockholders antagonistic.

But the bill charges that the acts complained of are an *evasion* of the constitution. It is not alleged, however, that there is any subterfuge or concealment. The real transaction is just as it appears. Individual stockholders of the two railway companies have seen fit to turn their stock over to a corporation alleged to have been formed with that intent and purpose. On its face this is either within the statutes or outside of them. It cannot be held illegal as an evasion of the statute, without saying that this court in the *Pearsall case* and in the *Louisville & Nashville case* pointed out to the parties how to evade the statute.

The notion that to do a thing not forbidden by statute, but which may produce the same or some of the same results as a thing which is forbidden, is illegal because it is doing indirectly that which the law forbids doing directly, is responsible for some loose argument and decision. It should have received its quietus from recent decisions in the House of Lords and Privy Council (*Bullivant v. Att'y Gen. of Victoria* (1901), A. C., 196; *Simms v. Register of Probates* (1900), A. C., 323).

What one man may lawfully do singly, two or more may lawfully agree to do jointly—that is, if the act is not immoral or wrongful. For a number to conspire to do a thing wrong or unlawful may be a crime, though for one to do

the same thing may not be a crime. But unless we greatly misunderstand the law, a thing which it is rightful and lawful for one person to do may lawfully be done by a combination of persons. As Justice Mitchell very well said in *Bohn Mfg. Company v. Hollis*, 54 Minn., 223, 234:

> "What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose remarks apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal. Hence, the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case. We have referred to this for the reason that counsel has laid great stress upon the fact of the combination of a large number of persons, as if that, of itself, rendered their conduct actionable. (*Bowen v. Matheson*, 14 Allen, 499; *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div., 598; (1892) App. Cas., 25; *Parker v. Huntington*, 2 Gray, 124; *Wellington v. Small*, 3 Cush., 145; *Payne v. Western & Atlantic R. Co.*, 13 Lea, 507)."

The case of *Mogul Steamship Co. v. McGregor* will be found a very satisfactory authority on this question.

Whatever injurious effect may be likely to follow from a misuse of power incident to ownership of a majority of

shares in two competing railway lines, that power is no more likely to abuse because it rests in several men, or in a corporation, rather than in one man.

The most astonishing extreme reached by the bill of complaint is the statement that the Northern Securities Company is "a railroad corporation" within the meaning of the laws of Washington. Yet it is only upon this forced and preposterous contention that the complainant can possibly point out any supposed breach of her laws. This branch of the complainant's contention need not be further noticed, because it is clear that the securities company has no franchise either to build, operate or manage a railway, its power being limited to the owning of stock and doing such acts as an individual owner of stock might lawfully do.

While it may be conceded, in accordance with the doctrine of *Attorney General against The Railroad Companies*, 35 Wis., 425, and *Stockton v. Central Railroad Company of New Jersey*, 50 N. J. Eq., 52, that a state may in a proper case in its own courts enjoin corporations to obey its laws within its own territory, there is no precedent, we submit, of a state or other sovereign power enjoining in the courts of a foreign state obedience to the statutes of the complaining state. It is a general principle that statutes can be enforced by a state within its own jurisdiction only (*Wisconsin v. Pelican Ins. Co.*, 127 U. S., 265).

This rule, as we understand it, is not confined to mere

penal statutes, but is of general application. It is a general principle of international law that the statutes of one country have no effect or operation in another. Can it be possible that a statute of Washington is rendered enforceable in the courts of foreign countries by the omission of penalties when the same statute would not have been enforceable if penalties had been added? Do police statutes without penalties differ in principle from statutes with penalties? Surely, the nature of the law is the same in either case, and in either case may properly be given the same extraterritorial obligation. A penalty is simply one form of punishment for disobedience; and if a law imposing a penalty cannot be enforced extraterritorially a different rule cannot be applied to the same law because it omits the penalties and merely commands obedience (*Security Trust Co. v. Dodd, Mead & Co.*, 173 U. S., 624, 629).

Can one nation sue in the courts of another to collect its customs or other taxes? In the case of *King of Spain v. Oliver*, Peters C. C., 276, it was conceded that the King could sue for the customs duties claimed only on proof of a contract or bond to pay them. See the case explained by Mr. Justice Gray in *Wisconsin v. Pelican Ins. Co.*, 127 U. S., 290.

Suppose a number of citizens of New York are engaged in that state in a scheme which, if successful, would fraudulently conceal from taxation property in Washington liable thereto or hinder the collection of taxes thereon. Could the state maintain a suit in this court to restrain such proceedings of those persons?

Suppose the State of Washington has a stringent pure-food law forbidding the sale within the state of adulterated goods. One or more persons in another state, citizens of that state, are engaged in making adulterated food products to be secretly shipped into Washington, and there sold to consumers. Would a bill to enforce such a statute by en-

joining the carrying out of such scheme be entertained in this court?

Suppose the State of Washington, like most of the other states, has a stringent insurance law forbidding unlicensed companies from insuring property in the state. One or more companies of other states are, without license, secretly issuing policies within the state. Can the state sue in this court to enjoin such violation of its statute?

Suppose two railway companies, incorporated in Illinois, operate lines in Washington, whose statutes prohibit any discrimination in railway rates as between persons or places. Those companies in Illinois agree upon discriminating rates upon traffic between points in Washington. Could the State of Washigton sue in this court to enjoin those Illinois corporations from thus violating its statutes?

And in any one of these cases, could the state maintain such a suit in the courts of another state or country, or in any jurisdiction but its own?

If the state can sue in equity in another jurisdiction to enjoin a threatened violation, or a continuance of an existig violation, of any of these statutes, why can it not, after such violation, sue at law in another jurisdiction for the statutory penalty made recoverable in a civil action, or for damages?

That it cannot sue at law is plainly held in *Wisconsin v. Pelican Ins. Co., supra.* And what reason can be given in support of the right to sue in equity in a foreign jurisdiction to enforce such statutes which would not equally sustain an action at law?

If a state may sue in a foreign jurisdiction to enjoin an obstruction to the collection of taxes on personal property within its limits, it may certainly sue there to collect them, if by its laws such taxes are collectible by action. The right of the state to have the collection of taxes unobstructed is no greater than, and no different from, its right to have the taxes paid. An obstruction of collection and a di-

rect refusal to pay are a violation of the same statutory right of the state. Could the state sue in this court to collect its taxes?

If the state can, as a sovereign, bring this suit in this court to enjoin the violation of the statutes here involved, it might—and every other state in like circumstances might—bring an original injunction bill in this court in every one of the cases supposed and in numberless others—indeed, in case of any attempted violation of almost any of its statutes of a public and governmental nature, especially any of the statutes passed in the exercise of its police power—and the original cases on the docket of the court would be the rule as they have heretofore been the exception.

In the *Pelican Insurance case* (page 289), the court, in speaking of its original jurisdiction under the Constitution, said:

> "The grant is of 'judicial power,' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other state at all."

That is, this court will not originally entertain a suit brought by a state which the state, on principles of international law, could not maintain in the courts of England or of one of the other states. We think the most diligent search will fail to find any case in England or in this country where a state or sovereign has maintained in any foreign court a suit solely to enforce its own laws. Undoubtedly a state may sue to recover its own *property*, and such a case could be maintained though the title to the property had passed in the complaining state by virtue of a statutory forfeiture. So suits can be maintained in a foreign country to enforce a contract, good by virtue of the laws of the country where it was made. So an action may be maintained in a

foreign jurisdiction for death, although the cause of action rests on a statute, and suits by creditors to recover against stockholders or officers of a corporation can sometimes be maintained, though the liability arose out of a foreign law. But in all these cases the courts enforce, not the law of a foreign state, but a right created under it. The foreign law has already enforced itself and done its work within the foreign territory in creating the right, whether of property or contract, and needs not, nor is it capable of, further enforcement in the particular case, whether in the domestic or in foreign courts. This suit is not to recover property or collect a debt, but is brought purely to enforce the foreign law. It is, moreover, a suit to aid the complaining state in enforcing its laws by injunction. The absence of any precedent for such a suit should be conclusive.

Section 14 of article XII of the Washington constitution does not touch the case. It is a prohibition against the pooling of earnings by common carriers. Substantially the same provision was in that section of the constitution of Kentucky considered by this court in the *Louisville &Nashville case* and it did not prevent this court from saying that the same persons might lawfully acquire the control by stock ownership of two competing railways. Moreover, the prohibitions of this section, like those of section 16, are directed only against action of *carrying corporations as such.*

The other section referred to (section 22 of article XII) is not completely quoted in the bill of complaint. It closes by this declaration:

> "The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise."

The section is evidently not self-executing. It does not in and of itself constitute a sufficient rule, either defining the right or duty created, or providing means for its enforcement. While the provision might be regarded as mandatory to the legislature to enact the needful legislation, that legislation not having been passed, the constitutional section standing alone merely indicates principles, without laying down any rules by means of which those principles may be given the force of law (*Cooley's Constitutional Limitations*, pp. 99, 100). On the latter page Judge Cooley says:

> "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law."

In a much stronger case this court held that the constitution of Mississippi was not self-executing (*Groves v. Slaughter*, 15 Pet., 495, 499-501). The constitution of Mississippi said, "The introduction of slaves into this state as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833." (See also *French v. Teschemaker*, 24 Cal., 518).

This court is without the benefit of any decision of the supreme court of Washington as to whether this section is self-executing, or as to (*a*) whether it applies to any except corporations organized in that state, or (*b*) whether it applies to acts done outside the state, or (*c*) as to what is a

monopoly or trust within its meaning, or (*d*) as to what is a *combination* within its terms, or (*e*) as to whether the individual acts of stockholders, as distinguished from their acts on behalf of the corporation, are intended to be reached.

In *Wood v. Seattle*, 23 Wash., 1, 20, 21, the supreme court of the complaining state held that this section did not prohibit the *consolidation* of competing street railway lines.

Little need be said as to those allegations of the bill showing the state to be a land owner and shipper. Up to this point we have endeavored to show (*a*) that the acts of the defendants are lawful, (*b*) that whether lawful or not the State of Washington cannot maintain this suit. If we are correct on either of these propositions, it disposes of the whole bill, including the allegations just mentioned.

In respect of these allegations the state devests itself of its sovereign character, and must make in its bill the case required to be made by any individual land owner or shipper suing in any court of general jurisdiction.

No injury has yet been sustained. True the railway companies are not yet building branches into the state's unimproved land, but that is a thing they have made no contract to do and are not obligated to do. It appears from the bill they and their predecessors have steadily refrained from doing so during all the years of their existence. If the omission to build these branches has gone on for many years without actionable injury to the state, it is hard to see how the continuance of the omission from November 13, 1901, until the present time is an injury entitling the state to an injunction. Neither company has any inducement to build these branches except the profit to be derived from them, and that inducement will be as strong and the branches

are as likely to be built, the majority of stock being owned by the Securities Company, as would be the case if the stock were distributed among many holders.

If the state as a land owner and shipper may bring a bill like this, so may every land-owner in Washington and every one in Washington, or out of it, who is shipping, or likely in the future to ship over either railway; for the gist of the complaint is not that the state has already been overcharged on any shipment, nor that either railway has threatened to overcharge it on any shipment it is about to make, but simply that from the infirmity of human nature the state apprehends an injury.

A state as sovereign may under the doctrine of *Attorney General vs. Railway Companies*, 35 Wis., sue in its own courts to compel corporations within its jurisdiction to obey its laws. That jurisdiction does not depend on the existence or non-existence of an adequate remedy at law and may be exercised without showing damage. But a state as a shipper can bring no suit in a foreign jurisdiction except upon those principles which control suits by other shippers. Can it be possible that every shipper on these railways could maintain injunction suits to restrain the Northern Securities Company from holding stock in the two defendant railway companies? As a shipper and standing like other shippers, the state could not maintain an injunction bill in a foreign court without showing the inadequacy of its remedies at law. The state as a shipper has, like other shippers, a plain, adequate, and complete remedy to test at law the reasonableness of rates.

GEO. B. YOUNG,
M. D. GROVER,
C. W. BUNN,
Of Counsel for Defendant Railway Companies.

No. 9
No. Origl -
State of Washington
vs
Northern Securities Co.

Allegation as part of paragraph VII of Bill of Complaint:

That the Northern Pacific Railway Company was organized as herein set forth for the purpose of purchasing the property, lines and franchises of the said Northern Pacific Railroad Company situated in the State of Washington and elsewhere, as in this complaint set forth, and for the purpose of doing business and operating said railroads as a common carrier in said State; that the articles of incorporation of said Northern Pacific Railway Company contemplate and authorize said Company to operate railroads in the State of Washington, and were entered into with reference to the laws of the State of Washington.

Allegation as part of paragraph IX of Bill of Complaint:

That the mutual agreement or arrangement, given in substance in this paragraph, was entered into at the city of New York.

The case of *Wood v. Seattle*, 23 Wash., 1, referred to on page 20 of this brief, is not in the brief given due prominence. In that case the court said, pages 20, 21:

"It is next said that the proposed ordinance, when considered in connection with the acquisition of the existing street-railway lines, creates a 'monopoly and trust,' and is therefore in violation of section 22 of article 12 of the State constitution. * * * The argument is that portions of the lines now in operation, and which may be absorbed by the proposed ordinance, are parallel and competing lines, and because of this provision the city is without power to pass an ordinance under which they may be combined or consolidated. Whether the proposed ordinance will have the effect of consolidating competing lines does not very clearly appear from the record, but, assuming that it will we cannot think that this section of the constitution was intended to be a limitation upon the legislative power to authorize such a consolidation whenever it may deem the public interests demand it. The prohibition is directed against combinations between corporations, companies, or individuals, made 'for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity,' and it is combinations of this character and for these purposes that constitute the monopolies and trusts which the constitution interdicts. Elsewhere in the constitution ample power is given the legislature to correct and prevent abuses such as the respondents contemplate, by fixing maximum rates and charges for the transportation of passengers and freight; and it was from this power that the constitution-makers intended that relief should be found from (to quote from that instrument) 'discrimination and extortion in the rates of freight and passenger tariffs,' rather than from the fancied relief to be obtained from competing lines."

The other provisions of the constitution to which the court refer in the above language are sections 13, 15, and 18 of article 12, which read as follows:

SEC. 13. "All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control * * *. All railroad companies

shall receive and transport each the other's passengers, tonnage, and cars, without delay or discrimination."

SEC. 15. "No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for transportation of the same classes of freight or passengers within this State, or coming from or going to any other State. Persons and property transported over any railroad, or by any other transportation company, or individual, shall be delivered at any station, landing, or port at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port, or landing. Excursion and commutation tickets may be issued at special rates."

SEC. 18. "The legislature shall pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, and to correct abuses and prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads and other common carriers in the State, and shall enforce such laws by adequate penalties. A railroad and transportation commission may be established, and its powers and duties fully defined by law."

10 Apl., 1902.

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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1901.

9 Original.

STATE OF WASHINGTON,
Complainant,

vs.

NORTHERN SECURITIES COMPANY, GREAT NORTHERN RAILWAY COMPANY, and NORTHERN PACIFIC RAILWAY COMPANY,
Defendants.

Since the brief was printed, our attention has been called to an opinion which was delivered orally in open Court, at Savannah, on June 30, 1893, by Mr. Justice JACKSON, overruling Judge SPEER.

The opinion was taken down and reported as herewith shown, by the Court stenographer, and this copy has been obtained through Mr. Adrian H. Joline, who was of counsel and was present and heard the opinion delivered. It is the same opinion to which reference is made by the Circuit Court of Appeals in 62 Federal Reporter, pp. 328, 333, 334.

The opinion was withheld from publication at the time, because of the desire of Mr. Justice JACKSON to revise the same as to form before final publication; but he died before accomplishing his purpose.

C. W. BUNN,
Of Counsel for defendant Railway Companies.

IN THE
CIRCUIT COURT OF THE UNITED STATES

FOR THE EASTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA.

ROWENA M. CLARKE ET AL. AGAINST THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA ET AL.	Bill, Etc. Final Decree.

Opinion of Mr. Justice Jackson, June 30, 1893.

JACKSON, Justice:

This question, gentlemen, arises under a very peculiar lawsuit, to say the least of it. Mrs. Clarke, with fifty shares of the capital stock of the Central Railroad and Banking Company, files her bill in this Court on the 4th of March, 1892, in which she seeks two distinct things. She seeks to set aside a lease made on the first of June, 1891. Now, upon one question of fact which my brother relies on, that this lessee, or its agent, to whom it turned over the property, did, between 1891 and March, 1892, wreck it. The reports of the directory, the showing of the books, the statements of the receiver negative that fact. The thing was wrecked before June, 1891. That is not material.

Upon the filing of her bill to effect the termination of the lease and to deny to the holder of 42,200 shares the right to vote and to declare the Directory then in power which she had herself helped to select—voted for them—upon the filing of that bill, I say, the Georgia Pacific Railroad Company, the lessor and the only

party to the contract with the Georgia Central, and as well as the Richmond and Danville Railroad Company, made a prompt appearance, and before filing answer, the latter Company by its attorney notified the Court that it did not claim any right under the lease whatever. Then the companies there after a few days, file their respective answers and disclaim the lease entirely. I have not found in this record, and counsel have not called to the attention of the court, any legal connection between the Richmond and Danville and that lease. It is stated by the Georgia Pacific, and by the evidence in this case, that the Georgia Pacific in 1888, having leased its lines to the Richmond and Danville, when it perfected a lease, or thought it had perfected a valid lease of the Central Railroad Company, says it turned over that to the Richmond and Danville Railroad Company. That is all. What liability, therefore, and what legal connection had the Richmond and Danville with the Georgia Central ? So far as the record discloses, not a single thing. But that is immaterial.

After that disclaimer of the lease, which terminated one of the questions of litigation in that suit, and under which the receiver was appointed, the court made an order that what was called "A legal election" should be held on the 14th of May, 1892, having previously denied the right of the holder of the 42,200 shares to vote at that election, having put an injunction upon the legal holder of that stock from voting it and the Central Company from accepting the vote of that stock. That election was held. A new Board of Directors were elected by the minority. What then, I say, what reason then existed for the continuance of the receivership ? There was none. The two stockholders, Mrs. Rowena Clarke, with fifty shares, and the Terminal Company, call it the trustee of the Terminal Company, or trustee of the Georgia Company, it does not matter which, had a private question between two stockholders. I say, therefore, that from and after the 14th of May, 1892, when the action of the court—

right or wrong in originally appointing the receiver—when the new Directors were elected, that receivership ought to have terminated as ending that question.

It was not terminated. On the 4th of July, 1892, the Central Company came into court and acknowledged practically its insolvency and asked for an administration of its assets. Rowena Clarke's bill of course after the election continued here only on the question as to whether the 42,200 shares of the Capital stock was entitled to vote.

I pass also the question as to the jurisdiction of the court on the regularity of the filing of this bill. In respect to the jurisdiction, I will say that Mrs. Clarke, as a citizen of the State of South Carolina, had the right to bring suit in the Federal Court against a corporation of Georgia and against two other corporations that were not citizens of Georgia; and if the latter corporations desired to raise the question of jurisdiction—I mean any point as to the jurisdiction of the court—they should have appeared and excepted to that jurisdiction. They did not do so and they came lawfully within the authority of this court to deal with them on these questions. Without considering whether the complainant in this case has shown a strict compliance with the 94th Rule, in having failed to invoke the exercise of the corporate management for authority to sue in the name of the corporation to set aside the lease, I think there is some doubt as to whether that rule was strictly complied with, but that is not material to the question under consideration.

The question under consideration is whether that injunction on the 42,200 shares held by the Central Trust Company, under the circumstances familiar to you, and which I will recite in a moment, whether those shares are entitled to vote in an election for directors of the Central Railroad Company. Certain individuals forming a syndicate buy up 40,000 shares. The Terminal Company organized, and chartered reg-

ularly by a sister State, with express authority to purchase and hold stocks and bonds in any of the railroads with the designated territory, within the designated State, has purchased 2,200 shares. Is there any law of Georgia that forbids that purchase? Was there any constitutional provision of Georgia that nullified that purchase, or rendered it illegal—a purchase made not in the State of Georgia, a contract made not with any Georgia corporation or Georgia individuals? Where is the constitutional provision of the State of Georgia, or its power either by legislation or constitutional provision to prohibit a lawfully organized corporation created by the State of Virginia, with express power to own and purchase stocks and bonds where is the power in the State of Georgia, in her legislature or her constitution to prohibit the purchase of that lawful property, issued and created under our own laws and put out before the world as salable? It does not exist. I concede that the State of Georgia may put in limitations and restrictions upon corporations in respect to the amount of property they shall acquire; in respect to the amount of stock they may authorize a corporation to issue; but I say that when that corporation has issued that stock, when it goes abroad as property, there is no power in this land that can deny to the owner the right to sell it, nor deny to the individual the right to buy it; and, if a corporation is created by any State with power to own and purchase stock, that that corporation is entitled to buy that stock, and that Georgia in her constitution and in her legislature could not prohibit it. Well, a syndicate of gentlemen, I do not care—it is wholly immaterial what their relations were to another corporation—they buy, and counsel for Mrs. Clarke has urged upon the court, they buy forty thousand shares of stocks for the purpose of controlling it as a syndicate for speculative purposes and to control the property of the Georgia Central. Any law to forbid that?

They were not a railroad Company. They were not in competition with any railroad company in the State of Georgia. Is it possible that this constitutional provision should be so construed as to say that you, Mr. Charlton, cannot buy up all the stock of the Georgia Central Railroad Company if you please, if you are able to do it? That would hardly be said to be in violation of the policy of the Georgia law, and when we come to speaking about State "policy" you are speaking about a very grave thing. But under the laws of Georgia and under this constitutional provision any private citizen had a right to buy any and all stocks that had been issued by the Georgia Central Railroad Company; he had an equal right to buy stocks of any and all other corporations. This syndicate bought up 40,000 shares of stock for the purpose of speculation. That is legitimate. They buy it up for the purpose of having a controlling stock interest in that property. That was legitimate. It brought it in competition with no Georgia road. It was not a contract or agreement made within the State of Georgia—made outside—and there is no Georgia Law, constitutional or legislative, that could deal with it, control it, or declare it illegal. What, then, do they do? They form a North Carolina corporation, called the Georgia corporation. Now, it was wholly immaterial whether it was a valid corporation or a mere association of individuals, wholly immaterial. The ownership of that stock, the holding of it by the individuals, or by the association or by the corporation, did not affect any right or violate any law of Georgia. The Richmond and West Point Terminal Company, under authority, under the powers of its charter, buy that stock from the Georgia Central.

Was that a Georgia Contract? Was that a Georgia agreement? Was that a contract that affected competition in Georgia?

It was not a contract under the Georgia law. Georgia law could not deal with it. The powers of

those two corporations were all that any court can look at and say whether it way a valid contract between them. The authorities have been read almost to confusion. They misapprehend the application bearing upon this question. The powers of corporations are derived from the sovereign that creates them. When they come into another jurisdiction, and make contracts, their contracts are governed by the jurisdiction of the State and by the laws of the State in which they make their contracts. That is all 13 and 14 Peters ever decided and all that has ever been decided by the Supreme Court of the United States, running from the case of the Augusta Bank down to the present time.

It was, therefore, a wrong proposition to say that the contracts of the individuals that acquired this stock—the contract by which they put it into the Georgia Company, created by the laws of North Carolina, and subsequently acquired by the Terminal Company under its charter powers in its contract with the North Carolina corporation. It was so required. It was held by them—jointly or severally is immaterial. They issued bonds upon it as security—put it in the hands of the Central Trust Company, as trustee for the bonds, which it was pledged to secure. Negotiable securities were passed into the country and from hand to hand, and carried full equity with them, and now we are told that those bondholders—that the security in the hands of the trustee is not a transportation corporation; that that trustee shall not be allowed to vote that stock. We may be sensitive about outside ownership of property in the States. Our State pride may run away with us sometimes in thinking that we ought to exclude foreigners—that we ought to exclude persons who have no identification with the State; but, gentlemen, you are dealing with private property and private rights here that no State can encroach upon, no State can violate.

Now, the Central Trust Company is the holder of that stock under a private arrangement between the Terminal Company and the North Carolina Company, I will call it for short, a certain arrangement under and by which the Central Trust Company is to vote that stock until after a default on the bonds which it was put in the Central Trust Company to secure.

The Terminal says, "You vote my two thousand shares," and the North Carolina Company says, "you vote my forty thousand shares and you vote it according to my direction." And we are told that that violates the constitution of Georgia. That is a great mistake. The amended constitution of Georgia, as my brother has distinctly and clearly and fully stated in the opinion from which he read—admirably stated, I may say places the prohibition upon the legislature from doing four things, neither of which it has done in this case. It is urged that the last clause in the constitutional provision, "all such contracts and agreements shall be illegal and void," applies. Did Georgia by her constitution undertake to pass upon the legality and validity of contracts made in Virginia, made in the State of New York? Certainly not. If she did, she exceeded her power and jurisdiction.

Well, what else is urged? It is said because the Terminal Company owned a majority of the stock in the Richmond and Danville Railroad Company, which it had a right to own, which it had a right to vote and use in the election of directors, and then the directors have the legal control or are the mouthpiece of the corporation—and that she has an interest, large or small, it does not matter, in the East Tennessee, Virginia and Georgia Railroad Company, which is not a controlling interest, but it does not matter if it was, and because the Terminal Company owns that stock in another corporation, that she cannot vote the stock she owns in the Central, or have it done through a trustee who is the common trustee of both herself and

the North Carolina corporation. Why? Why? The Terminal had a right to acquire that stock, had a right to own it and to vote it. But it is said it might lead, or may lead, or was intended to lead, to a condition that would prevent competition. How so? How so?

Is there any competition in point of fact between the Central Railroad and Banking Company and the Georgia Pacific leading out to the Northwest from Atlanta—that is, the lessee. What competition in the eye of the law? I can suggest to you, gentlemen, a case that would have fallen within the constitution of Georgia, perhaps. If the East Tennessee, Virginia and Georgia Railroad Company, running a line from Atlanta to the coast, parallel to the Central Railroad Company, had as a corporation—had as a corporation—I emphasize that, had as a corporation undertaken to buy up the stock of the Central Railroad Company you would then have had a case coming within the purview and principle of the constitution of Georgia. But they say because a stockholder in two corporations had stock in two corporations that that stockholder cannot vote in both corporations. It is an anomaly beyond expression to my mind. But it does not come within any inhibition of the constitution of Georgia. When those contracts are purchased, personal properties are made beyond the jurisdiction of Georgia. To say that is illegal by Georgia law cannot be sustained.

For Georgia law cannot reach the transaction, Georgia law cannot deal with those stocks and inhibit their purchase and their sale, and the only question in this case that ever would have given trouble would have been the power of that corporation, the Terminal Company and the North Carolina Company to have held and owned such stock, but they each had the power of the sovereigns that created them to purchase, abide and hold these stocks, and there is nothing in the constitution of Georgia or in its laws

to deny them their rights and interests as such holders in this property. That is my judgment of the law of this case. A judgment will be rendered in accordance therewith, dismissing and dissolving the injunction that restrained the voting of that stock, and dismissing Rowena Clarke's bill at her cost, except so much of the cost therein as accrued up to the time of these corporations entering their appearances and disclaiming the lease.